

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS JOSEPH DUNPHY JR.,

Petitioner,

No. CIV-S-04-2623 DFL KJM P

vs.

DAVID L. RUNNELS,

Respondent,

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se with an application for writ of habeas corpus under 28 U.S.C. § 2254. Respondent has filed a motion to dismiss. On October 12, 2005, the court ordered petitioner to file either an opposition or a statement of non-opposition to respondent's motion. Petitioner was warned that failure to file a response could result in this action being dismissed under Federal Rule of Civil Procedure 41(b) for petitioner's failure to respond to court orders. Petitioner has not responded to the court's October 12, 2005 order.

Under Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992), the court must consider five factors before dismissing a case under Federal Rule of Civil Procedure 41(b): (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the respondent; (4) the public policy favoring disposition of cases on their merits; (5) and the availability of less drastic alternatives.

1 Petitioner's failure to follow the court's October 12, 2005 order has thwarted the
2 public interest in expeditious litigation and has compromised the court's ability to effectively
3 manage its docket. There do not appear to be suitable alternatives to dismissal because it does
4 not appear petitioner is interested in litigating this case any longer. While there is nominal
5 prejudice to respondent should this case continue, and the public policy favoring disposition of
6 cases on their merits weighs in favor of not dismissing this action, consideration of the other
7 three Ferdik factors and their greater weight under the circumstances of this case demonstrates
8 that dismissal is the correct course of action.

9 Accordingly, IT IS HEREBY RECOMMENDED that:

- 10 1. Petitioner's application for writ of habeas corpus be dismissed; and
11 2. This case be closed.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
17 shall be served and filed within five days after service of the objections. The parties are advised
18 that failure to file objections within the specified time may waive the right to appeal the District
19 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 DATED: March 8, 2006.

21
22 
23 UNITED STATES MAGISTRATE JUDGE
24
25
26